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No. 434

In the Supreme Court of the United States

October Term, 1946

Grinnell Machine Products Co.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C. 151 *et seq.*)):

Sec. 7 17

Sec. 8 (1) 17

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 234

GRIEDER MACHINE TOOL & DIE COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 396–402) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 75–80, 37–72) are reported in 49 N. L. R. B. 1325.

JURISDICTION

The decree of the court below (R. 395) was entered on April 13, 1944. The petition for a

writ of certiorari was filed on July 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon findings that petitioner discouraged membership in a particular labor organization, the Board abused its discretion in requiring petitioner to post notices stating that its employees were free to become or remain members of that organization and that petitioner would not discriminate against any employee because of his membership or activity in any such organization, without adding a statement that the employees were free to join any labor organization of their choosing.

Two further questions are urged by petitioner which, we think, are not properly presented in this case. These questions are as follows:

2. Whether the Act requires an employer to initiate a resumption of bargaining negotiations broken off by the statutory bargaining representative of its employees.

3. Whether testimony by a discharged employee warranting a finding of discrimination constitutes, if believed by the Board, substantial evidence for such a finding notwithstanding that the testimony is wholly contradicted and is not supported by other evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 17–18.

STATEMENT

Upon charges filed by the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations (R. 28–29), hereinafter called the Union, and upon the usual proceedings, the Board, on May 29, 1943, issued its findings of fact, conclusions of law, and order (R. 75–80, 37–72). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

On April 17, 1942, petitioner's employees Henry Clabaugh and William Rudolph called at the C. I. O. headquarters at Toledo, Ohio, where they were given membership-application forms and were appointed the Union's organizers and its temporary officers at petitioner's Bowling Green, Ohio, plant (R. 39–40; 106). They at once began to enroll their fellow workers as members of the Union, and within a short time membership meetings were held (R. 40; 94–99, 101–104, 106, 253). During the week in which Clabaugh began to organize, Plant Superintendent Strothers ques-

[1] In the following statement, references preceding the semicolons are to the Board's findings, including the findings of the Trial Examiner which the Board adopted (R. 76); and succeeding references are to the supporting evidence.

tioned him on two separate occasions about the Union's progress (R. 40; 107). Strothers also asked employee Orval Markley several times whether he had attended union meetings and how many employees were present (R. 40; 97–98, 253).

On April 25, 1942, a week after he had begun to solicit membership for the Union, Clabaugh was discriminatorily discharged (see pp. 5–7, *infra*). Two days later, Rudolph was also discharged (R. 40–41, 195).[2] Following their discharge, Clabaugh and Rudolph continued their efforts to unionize petitioner's workers (R. 41; 112–113, 124–125, 198–199). They conversed with the employees and passed out union handbills in the public street adjacent to the plant (R. 41, 76–77; 112–113, 124–125, 198–199, 206, 208). For the purpose of depriving them of access to its employees, petitioner repeatedly summoned the police and urged the police to put a stop to the organizational activities of Clabaugh and his associates (R. 76–77, 41; 256–261, 154–159, 112–113, 124–126, 131–132, 206–208).

In May 1942, the Union filed a petition with the Board for certification as the exclusive bargaining representative of the Company's employees (R. 41; 82). At the hearing on this petition, the Company consented to an election (R. 56; 90–92). A few days before the hearing, employee Robert Nye, who had been requested by the C. I. O. to

[2] The Board adopted the Trial Examiner's finding that Rudolph's discharge was not discriminatory (R. 79, 52–56).

be present (R. 210), asked his foreman, William Beck, for permission to attend (R. 42; 209–210). Foreman Beck turned down Nye's request, saying that attendance at the Board hearing would "probably cost [Nye] his job" (R. 42; 210). On the day of the hearing, however, Nye obtained permission from Superintendent Strothers and attended the hearing (R. 42; 211–212, 234–235). President Grieder upbraided Nye on the latter's return (R. 42–43; 146–147). In censuring Nye, Grieder declared: "The C. I. O. called you to that election, didn't they?" and, in response to Nye's admission that such was the case, Grieder retorted: "They are a bunch of drunken bums. Go home and I will see how I feel tomorrow" (R. 43; 147).

Henry Clabaugh, as has been noted (p. 3, *supra*), initiated and was the leader in the movement to organize petitioner's workers; he was the chairman of the Union's organizing committee (R. 45; 106). Superintendent Strothers asked Clabaugh "how the Union was coming" (R. 45; 107), and, despite Clabaugh's profession of ignorance concerning the Union, Strothers later repeated this question and asked Clabaugh when the Union intended to have its membership meetings (R. 45; 107–108).[3]

[3] When Strothers was asked at the hearing whether he knew that Clabaugh was a member of the Union, he evasively replied: "* * * I couldn't positively say he was a member" (R. 252).

On the morning of July 25, 1942, the day of his dismissal, Clabaugh was delayed in beginning his work for about 45 minutes because of circumstances beyond his control (R. 50; 109). Observing this, Superintendent Strothers questioned Clabaugh and accepted his explanation for the delay without comment (R. 50; 109). About 3 o'clock that afternoon, however, Strothers, after talking to President Grieder, discharged Clabaugh, assertedly because of his lateness in starting work that morning (R. 50; 109–110, 246). When Strothers told Clabaugh of the asserted reason for the discharge, Clabaugh inquired: "Is that the only reason, or is it the Union?" to which Strothers replied, "What do you think?" (R. 50; 110). Strothers, in Clabaugh's presence, filled in a separation slip assigning Clabaugh's lateness in starting work as the sole reason for the dismissal (R. 50–51; 110). The slip, as Clabaugh received it through the mail, contained additional reasons that, purportedly, motivated the discharge (R. 51; 110), namely, that Clabaugh had smoked excessively in the plant and had too frequently engaged in conversation with other employees during working hours (R. 51; 110, 393).[4] However,

[4] At the hearing, petitioner enlarged upon these reasons by asserting that Clabaugh was not a competent workman (R. 45; 116). This belated charge was refuted, as the Board noted (R. 45), by proof that Clabaugh spent a training period of 4 weeks in petitioner's plant prior to his employment, and that petitioner hired him after having had this opportunity to observe his work (R. 113–114, 242–243, 286–287).

smoking had been permitted during working hours, as had conversation among the employees (R. 46–47; 276, 122–123, 251), and Clabaugh had never been reprimanded on either score (R. 122–124).

The appropriateness of the bargaining unit was stipulated in the representation proceeding previously mentioned (R. 56, 77; 84). On July 27, 1942, the Union won the election, and on August 18, 1942, the Board certified that the Union was the exclusive bargaining representative of the aforesaid unit (R. 56; 90–92). On August 31, 1942, when a Union representative called upon President Grieder for the purpose of arranging a bargaining conference, Grieder refused to deal with the Union, asserting that the Board certification "didn't count any more because all the C. I. O. people were gone" (R. 57; 161). Grieder also informed the Union representative that he would consult his attorney in regard to the Union's bargaining request (R. 162). Subsequently, petitioner's secretary and its attorney met with the Union's representatives on several occasions to discuss the Union's contract proposal (R. 58; 162).

While these discussions were under way, a group of employees opposed to unionization of the plant, who called themselves the "Association," filed a petition with the Board alleging that a question concerning the representation of petitioner's employees had arisen (R. 59; 221, 224,

225, 226–229, 387). The Board's Regional Director notified petitioner of this by letter, dated November 13, 1942, stating that an examiner had been assigned to investigate the matter and that petitioner should "address any inquiries or communications to him" (R. 59; 387). On November 16, 1942, petitioner's representatives informed the Union representatives of this letter and stated that "they felt that legally they couldn't deal" with the Union "due to this matter pending before the Board" (R. 60; 185). When petitioner's representatives persisted in this stand, the Union representatives announced an intention to file unfair labor practice charges with the Board, to which one of petitioner's representatives replied, "you go ahead * * * and we will let the Government settle it" (R. 61; 189). The conference of November 16 ended with petitioner adhering to its refusal to accord the Union the recognition to which it was entitled as the certified bargaining representative of petitioner's employees (R. 185–189, 167–170).

On the day following this meeting, the Board's Regional Director sent petitioner a copy of a letter that he sent to the Association, dated November 17, 1942, informing the Association that its petition had been "carefully investigated and considered" but that, "further proceedings [did] not seem warranted". The letter also stated that the Association could obtain a review of the

Regional Director's action by filing a request therefor. (R. 62; 386.) Petitioner's attorney, on receipt of this letter, communicated with the attorney for the Association and was informed that the latter intended to request a review by the Board of the Regional Director's action (R. 62; 330). Petitioner never attempted to resume the bargaining negotiations broken off on November 16, nor has it receded from its withdrawal of recognition from the Union on that date (R. 63; 170, 331).[5]

The Board concluded that petitioner had discriminatorily discharged Clabaugh in violation of Section 8 (3) of the Act (R. 51), had refused on November 16, 1942, and thereafter to bargain collectively with the Union in violation of Section 8 (5) of the Act (R. 63–67) and by each of these acts as well as by the activities of President Grieder, Superintendent Strothers and Foreman Beck, including Strothers' questioning of employees concerning their union activities, the incidents involving the police, and the incidents involving Nye, had interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act (R. 43–44, 51, 67, 76–77).

[5] After the close of the Board's hearing in this case, the Board dismissed the Association's appeal from the Regional Director's refusal to proceed on its petition, and on February 8, 1943, the Regional Director informed petitioner of this. At the oral argument before the Board, counsel for petitioner stated that neither petitioner nor the Union had communicated with each other since November 16, 1942.

The Board's order, issued May 29, 1943, required petitioner to cease and desist from its unfair labor practices; to reinstate Clabaugh with back pay; to bargain collectively with the Union; and to post notices (R. 77–79).

Thereafter, the Board filed a petition in the court below requesting enforcement of its order (R. 1–5). On April 13, 1944, the court handed down its opinion (R. 396–402) and entered a decree (R. 395), enforcing the Board's order in full.

ARGUMENT

1. Petitioner contends (Pet. 9–10) that the Board abused its discretion in ordering petitioner to post notices stating without more that its employees were free to become or remain members of the particular labor organization which petitioner had opposed, and that petitioner would not discriminate against its employees because of membership or activity "in any such organization" (R. 79). In determining "how the effect of prior unfair labor practices may be expunged" (*International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82), the Board could reasonably find, as it did, that it would effectuate the policies of the Act to require the offending employer to assure its employees in specific terms that they could join a union without fear of reprisal and that this guaranty extended to the particular union that had been the target of its unfair labor

practices. Such a provision is "adapted to the situation which calls for redress." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. While several circuit courts of appeals have, in the cases cited at pages 9 and 10 of the petition for certiorari, provided for the inclusion in such notices of the further statement, in substance, that the employees were free to join any union, these courts have in other cases, some of which are subsequent to those cited by petitioner, enforced posting requirements identical with the one here in controversy.[6] This

[6] See, *e. g.*, *National Labor Relations Board* v. *Regal Knitwear Co.*, 140 F. (2d) 746 (C. C. A. 2), enforcing 49 N. L. R. B. 560, 562; *Greenport Basin & Construction Co.* v. *National Labor Relations Board*, 132 F. (2d) 857 (C. C. A. 2), enforcing 42 N. L. R. B. 377, 403; *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586, 589 (C. C. A. 2), certiorari denied, 313 U. S. 594, enforcing 39 N. L. R. B. 501, 529; *National Labor Relations Board* v. *Brown Paper Mill Co. Inc.*, 133 F. (2d) 988, (C. C. A. 5), enforcing 36 N. L. R. B. 1220, 1244–1245; *National Labor Relations Board* v. *Hawk & Buck Co. Inc.*, 120 F. (2d) 903 (C. C. A. 5); *National Labor Relations Board* v. *Oklahoma Transportation Co.*, 140 F. (2d) 509, 510 (C. C. A. 5), enforcing 50 N. L. R. B. 907, 909–910; *National Labor Relations Board* v. *Richter's Bakery*, 140 F. (2d) 870, 873 (C. C. A. 5), certiorari denied, May 29, 1944, No. 970, October Term, 1943, enforcing 46 N. L. R. B. 447, 453; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714 (C. C. A. 8), enforcing 48 N. L. R. B. 354, 361; *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. (2d) 588 (C. C. A. 8), enforcing 33 N. L. R. B. 351, 367; *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d) 410 (C. C. A. 10), enforcing 47 N. L. R. B. 586, 587–588; *National Labor Relations Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. (2d) 419, 429 (C. C. A. 10).

indicates that these courts have adopted no hard and fast rule, but vary their decision according to the facts presented. Moreover, even if the decisions of the various circuit courts of appeals on this point could be regarded as in conflict, the numerous minor changes made by the courts in the wording of the notices would not raise an issue of sufficient importance to warrant the granting of a writ of certiorari. The Court has denied two petitions by employers for writs of certiorari which raised the same question that petitioner here urges. *Baltimore Transit Company* v. *National Labor Relations Board,* No. 735, October Term, 1943 (Pet. 7, 12, 29–30), certiorari denied, April 3, 1944; *Aintree Corporation* v. *National Labor Relations Board,* No. 702, October Term, 1942 (Pet. 3, 17–18, 23, 25–27), certiorari denied, 318 U. S. 774. Indeed, the notices in each of these cases required a statement without more that the employer would not discriminate against the employees because of their membership in the particular unions which had been the target of the unfair labor practices, whereas in the instant case the required assurance extends not only to the particular union but petitioner is required to affirm that it "will not discriminate against any employee because of his membership or activity in any such organization" (R. 79). Thus, the argument that the form of notice may mislead the em-

ployees into the mistaken belief that they can join only the Union named in the notice (Pet. 10) is without merit.

2. The second question that petitioner seeks to raise, namely, "Must an employer initiate renewal of bargaining which has been broken off by the union?" (Pet. 9, 11–13) is not, we submit, present in this case because it assumes a state of facts contrary to the evidence and contrary to the Board's findings, concurred in by the court below.

The evidence affords more than adequate support for the Board's findings that the negotiations ended on November 16, 1942, not as petitioner asserts (Pet. 12–13), because it was unwilling to agree to certain of the Union's contract demands, but because petitioner took the position that, despite the Board's certification of the Union, it would no longer recognize the Union as the exclusive bargaining agent of its employees (R. 60–61, 64; 167–170, 184–189, 329, 337–338, 342–344). Furthermore, the Board, on reviewing the entire record (R. 65–66, 76), found that on November 16, petitioner "deliberately seized upon the opportunity afforded it by the Regional Director's letter of November 13 [*supra,* p. 8] to bring an end to negotiations in which it was plainly an unwilling participant" (R. 66, 76). The Board also found (R. 66–67) that even if it had believed petitioner's

assertion that the Regional Director's letter of November 13 raised an honest doubt in petitioner's mind respecting its continuing duty to recognize the Union, that doubt should have been dispelled when petitioner received the letter of November 17 from the Regional Director (*supra*, p. 8), informing it of the Director's rejection of the Association's petition (R. 66). Hence the central fact that underlies the violation found in this case is that the negotiations terminated on November 16 because petitioner in bad faith took the position that it would no longer accord the Union the recognition to which the Union was entitled by virtue of the recently issued certification. The court below did not disturb this or any other finding of the Board. On the contrary, the court below expressly said: "We do not go into detail touching the evidence as to what caused the break in negotiations on November 16. It is enough to say that the Union's representatives insisted upon going forward and respondent's contention was that in view of the Regional Director's letter of November 16 it doubted the advisability of further recogizing the status of the Union as bargaining agent" (R. 398). In short, the factual premise on which the question that petitioner urges is based is contrary to the evidence and contrary to the concurrent findings of the Board and the court below.

3. It is believed that the third question that petitioner seeks to raise is likewise not present in the case. The question (Pet. 9, 13–15) is whether Clabaugh's[7] testimony, warranting an inference of discrimination, if true, constitutes substantial evidence for a finding of discrimination even though the testimony is contradicted in all respects and is unsupported by other evidence. Contrary to petitioner's assertion, however, the finding that Clabaugh's discharge was discriminatory does not rest solely on his own testimony; it is also cogently supported, as the evidence previously summarized reveals (pp. 3–7, *supra*), by a congeries of undisputed circumstances and by the impausibility of petitioner's belated explanations for the discharge. Furthermore, as this Court has repeatedly held, the Board has the exclusive province "of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. The cases relied upon by petitioner (Pet. 14–15) turn on their facts and do not show a conflict.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of

[7] Clabaugh was discharged on July 25, 1942, and the Board subsequently ordered his reinstatement with back pay. (See Statement, *supra*, pp. 5–7, 10.)

general importance. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WALTER CUMMINGS, JR.,
Attorney.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
ROMAN BECK,
Attorneys,
National Labor Relations Board.

JULY 1944.